

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 261 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

- =====
1. Whether Reporters of Local Papers may be allowed :
to see the judgements?
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO
1 & 2 Yes
3 to 5 No

COMMISSIONER OF INCOME TAX

Versus

CHANDANBEN MAGANLAL

Appearance:

MR MANISH R BHATT for Petitioner
NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE
Date of decision: 12/05/1999

ORAL JUDGEMENT (per A.R. Dave, J.)

At the instance of the revenue, the Income Tax
Appellate Tribunal Ahmedabad Bench 'B' has referred to
this Court the following question of law arising out of

its order dated 4th October 1983 passed in I.T.A. No. 471/Ahd/1982 under the provisions of sec. 256(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessee is entitled to the benefit of exemption under section 54 of the Income-tax Act, 1961?"

2. The relevant facts pertaining to the case are as under:-

3. The respondent-assessee had purchased a house property for Rs. 14,999. The said amount was paid from cash gift of Rs. 15701 which was received by her from her husband on the same day. The said house property was sold during the relevant assessment year for a sum of Rs. 84,999. From the sale proceeds, on 16.3.77, the assessee had purchased 15% share in another house property which was owned by her husband and her son. The respondent-assessee claimed exemption under the provisions of sec. 54 of the Act in respect of capital gain which was used for the purpose of purchase of the interest in the house property. It is pertinent to note that prior to purchase of 15% interest in the house property, the respondent assessee was residing in the said house with her husband and the son and even after purchase of 15% interest in the said house property, she continued to stay in the said house property.

4. The ITO rejected the claim on the ground that the property which was purchased by her on 16.3.77 was also being used by her for her residential purposes along with her husband before interest in the property was purchased by her and she had purchased only some interest in the said house property. Moreover, he also held that the capital gain arising from the transaction referred to hereinabove should be assessed in the hands of the husband of the respondent-assessee, as the husband was the real owner of the property purchased by the assessee because the consideration for purchase of the property was given by the assessee from the amount of gift received by her from her husband. In another proceeding initiated by the assessee's husband, the finding with regard to assessing capital gain in the hands of the assessee's husband had been reversed and therefore at this stage we are not concerned whether the husband of the assessee should be assessed for the amount of capital gain.

5. In an appeal before the AAC, it was held that the respondent-assessee was entitled to claim exemption under the provisions of sec. 54 of the Act.

6. The revenue had taken the matter in appeal before the Tribunal but the Tribunal upheld the order of the AAC whereby claim of the respondent-assessee for exemption under the provisions of sec. 54 of the Act was justified. Section 54 of the Act, at the relevant time, was as under:-

54. Where a capital gain arises from the transfer of a capital asset to which the provisions of section 53 are not applicable, being buildings or lands appurtenant thereto the income of which is chargeable under the head "Income from house property", which in the two years immediately preceding the date on which the transfer took place, was being used by the assessee or a parent of his mainly for the purposes of his own or the parent's own residence, and the assessee has within a period of one year before or after that date purchased, or has within a period of two years after that date constructed, a house property for the purposes of his own residence, then, instead of the capital gain being charged to income-tax as income of the previous year in which the transfer took place, it shall be dealt with in accordance with the following provisions of this section, that is to say,

(i) if the amount of the capital gain is greater than the cost of the new asset, the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; nor

(ii) if the amount of the capital gain is equal to or less than the cost of the new asset, the capital gain shall not be charged under section 45; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be reduced by the amount of the capital gain.

7. The question which has been referred to us is

whether purchase of a portion of the house property or some interest in the house property wherein the respondent-assessee was residing prior to the purchase would disentitle her from making a claim under the provisions of sec. 54 of the Act.

8. Two points are involved in the said question.

First - whether mere purchase of interest in a residential house is sufficient, provided all other conditions are fulfilled, to claim exemption under the provisions of sec. 54 of the Act. Second - whether an assessee is entitled to claim the exemption u/s 54 of the Act, provided all other conditions are fulfilled, if he purchases a house property which was used by him for his residence prior to the purchase.

9. Before considering the said two points, let us see the sum and substance of the provisions of Sec. 54 of the Act. It is clear upon perusal of the said section that to avail the exemption under the said section, the capital asset which is sold should have been used by the assessee or his parent as residence and within the period prescribed under the section, the assessee should either purchase or construct a residential house for the purpose of his own residence. Thus, the legislature has provided that if the house property which is sold was used for residential purpose by the assessee or his parent is sold and from the long term capital gain earned another house property is purchased for the assessee's residence, subject to the provisions of the section, the capital gain should not be taxed.

10. So far as the first point is concerned, we are of the view that, when the Act enables an assessee to get exemption from payment of tax in respect of purchase or construction of a residential house, purchase or construction of a portion of the house, should also enable the assessee to claim the exemption. It is possible that a person may not be in a position to purchase the whole residential house at a time and in the circumstances an assessee might purchase a portion of the house or some interest in the house. In the instant case, 15% of undivided share in the house property was purchased by the assessee from her husband and her son. It is a settled legal position that when there is a doubt about the meaning of any statutory provision, the provision is to be understood in the sense in which it can harmonise with the subject of the enactment and the object which the legislature has in view. In view of the said principle, it is very clear that when the legislature has desired to give exemption to an assessee

who is selling his residential house so as to purchase another residential house, one cannot interpret the provision in a manner which would disentitle the assessee to claim the exemption under the section merely because the assessee could not purchase the residential house in toto and the assessee purchased only a portion of the house.

11. We are supported in our above-referred view by a judgment delivered in case of CIT, Ahmedabad v. Tikyomal Jasanmal, 82 ITR 95, wherein it was held that a portion of house property constructed by the assessee can be taken as a unit of house property. In the case referred to hereinabove, the assessee had constructed a portion of the house property during the period prescribed under the provisions of sec. 54 whereas in the case with which we are concerned, the assessee had purchased some interest in the said property as the assessee had purchased 15% interest in the property. The ratio of the case referred to hereinabove can be very well applied in the instant case because in the case referred to hereinabove the assessee had constructed portion of the house property whereas in the instant case the assessee had purchased some interest in the house property.

12. In the circumstances, we are of the view that the Tribunal was right when it came to the conclusion that merely because the assessee had purchased 15% of undivided share in a residential house, the assessee cannot be disentitled from making a claim for exemption under the provisions of sec. 54 of the Act.

13. The second point is whether by purchase of a residential house or a portion of the house or some interest in the house which was being used by the assessee for his residence prior to the purchase can disentitle the assessee from making a claim for exemption under the provisions of sec. 54 of the act.

14. In the instant case, the assessee was also residing with her husband and her son before the property in question was purchased by the assessee. Simply because the assessee was residing in a residential house which was purchased by the assessee, the revenue cannot be permitted to say that the assessee cannot claim exemption under the provisions of sec. 54 of the Act. Section 54 of the Act nowhere states that a residential house which is purchased by the assessee so as to enable the assessee to get exemption under the provisions of sec. 54 of the Act should not be the one in which the assessee was residing. It would be absurd to give such

an interpretation so as to disentitle an assessee from getting an exemption if the assessee purchases the house property wherein he was residing prior to the purchase. When the section does not put any such embargo, it would be absolutely against the settled principles of interpretation of statute to read such an intention of the legislature so as to deprive an assessee from getting an exemption under the provisions of sec. 54 of the Act. In such a case, if there is a bona fide purchase, the revenue cannot be permitted to say that the assessee is not entitled to exemption under the provisions of sec. 54 merely because the assessee was residing in the house which was purchased by the assessee.

16. In the instant case, it is an admitted fact that the assessee had purchased interest in the house property which was also used by her for her residence. What one has to see is whether a residential house has been purchased. It is immaterial whether the assessee was using the said house before it was purchased by the assessee. As the section is so clear and as the section does not put any embargo, we are not inclined to accept the view expressed by the ITO that the assessee was not entitled to exemption because she purchased interest in the property which was being used by her as her residence prior to the purchase. The Tribunal has rightly set aside the said finding by coming to the conclusion that the assessee was entitled to exemption though the said residential house was used by her as her residence along with her family members before interest in the said property was purchased by her so as to avail exemption under the provisions of sec. 54 of the Act.

16. In the circumstances, in our opinion, the Tribunal was right in holding that the assessee was entitled to the benefit of exemption under the provisions of sec. 54 of the act. Thus, the question referred to us is answered in affirmative, that is, in favour of the assessee and against the revenue.

The reference is disposed of accordingly with no order as to costs.

(hn)